

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
BRIEF**





# 76-4273

IN THE  
**United States Court of Appeals**

FOR THE SECOND CIRCUIT

JOHN L. McLUCAS, Administrator,  
Federal Aviation Administration,  
*Complainant-Appellee,*  
vs.

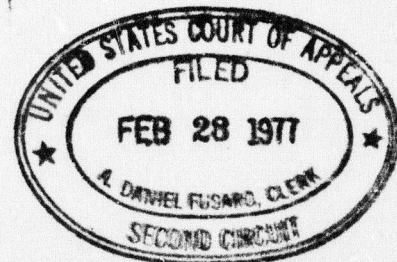
GEORGE W. IRMISCH,  
*Respondent-Appellant.*

APPEAL FROM THE UNITED STATES OF AMERICA  
NATIONAL TRANSPORTATION SAFETY BOARD.

**BRIEF FOR RESPONDENT-APPELLANT**

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BATAVIA TIMES, APPELLATE COURT PRINTERS  
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INDEX TO BRIEF

	Page
THE ISSUES.....	1
STATEMENT.....	1
POINT 1 - APPELLANT DID NOT FLY INTO KNOWN ICING CONDITIONS.....	3
POINT 2 - THERE IS NO INDICATION IN THE RECORD THAT STRUCTURAL ICING WAS THE CAUSE OF THE CRASH.....	4
POINT 3 - THE AIRFRAFT WAS NOT OVERLOADED.....	7
CONCLUSION.....	9



## PRELIMINARY STATEMENT

The decision herein appealed from was rendered by the National Transportation Safety Board and a copy of that decision is set out on Page 312 of the Record.

## THE ISSUES

The issues presented by this appeal are:

1. Whether or not it was error for the National Transportation Safety Board to affirm the decision of the Administrative Law Judge's finding that the Appellant violated Sections 91.31(a) and 91.9 of the Federal Aviation Regulations.

2. Whether or not the Appellant had flown into an area of known icing conditions.

3. Whether or not the aircraft was overloaded.

4. Whether or not structural icing was the cause of the crash.

5. Whether or not the findings of fact and conclusions of law relating to each of the alleged violations are supported by preponderance of reliable, probative and substantial evidence elicited from the witnesses at the time of the hearing.

## STATEMENT

On December 28, 1974, the Appellant filed an IFR Flight Plan with Buffalo Flight Service for a flight from Niagara Falls International Airport to Clarksburg, West Virginia. At the time, the Appellant was a holder of commercial pilot certificate no. 057408161 with ASEL, AMEL, Instrument-Airplane ratings. Appellant



acted as pilot in command of civil aircraft N-29496, a Cessna Model 177, and carried three passengers on the proposed flight.

The Appellant departed the Niagara Falls International Airport in accordance with his IFR clearance, and initiated a climb to 6,000 ft. as directed. During the course of the climb to his assigned altitude, he experienced engine difficulties, resulting in engine failure and shortly thereafter, the aircraft crashed in an open field in Grand Island, New York. The Administrator subsequently alleged that the Appellant had violated Section 91.31(a) and Section 91.9 of the Federal Aviation Regulations. In conjunction therewith, by Order of Suspension, dated October 8, 1975, the Regional Counsel for the Eastern Region of the Federal Aviation Administration suspended Appellant's Airman's Certificate for a period of 180 days.

The Appellant appealed this Decision and a hearing was held on May 13, 1976, in Buffalo, New York, before the HON. JOHN E. FAULK, Administrative Law Judge, and extensive testimony was taken at that time.

On July 9, 1976, the HON. JOHN E. FAULK rendered a written Initial Decision and Order, affirming the Administrator's Complaint but reduced the sanction to a 60-day suspension of Appellant's Airman's Certificate from the initial 180-day suspension. On July 19, 1976, the Appellant filed a Notice of Appeal of the HON. JOHN E. FAULK's written Initial Decision and Order, pursuant to Section 821.47 of the Rules of Practice in Air Safety Proceedings.



The National Transportation Safety Board affirmed the decision of the HON. JOHN E. FAULK's written decision and order.

ARGUMENT

POINT I

APPELLANT DID NOT FLY INTO  
KNOWN ICING CONDITIONS

As to the issue of whether the Appellant received a weather briefing advising him of known icing conditions, it is necessary to read testimony of the Administrator's witness, William B. Tubbs on direct examination, cross examination, redirect examination and re-cross examination (Record Page 38-63). Specifically, Airmet Foxtrot 4 did not give the freezing level for the Western New York area and Mr. Tubbs testified that it was possible that he did not provide the freezing level to the Appellant (Record Page 50-53). Mr. Tubbs also testified he gave the top of the cloud reports to the Appellant as 4,000 ft., and that he gave this information to the Appellant at approximately 3:30 p.m. on that date (Record Page 38), and further, he testified that he received the report at 2:08 p.m., local time (Record Page 58) and also stated that this top report was only valid for one hour (Record Page 56). He also was unable to state whether he so informed the Appellant that the report he gave him was invalid (Record Page 60). In effect, Mr. Tubbs had provided the Appellant with a top of the cloud report that he knew was invalid when he gave it to him.



There is nothing from this testimony of the Appellee's witness, nor Appellee's Exhibit No. 1 (Airmet Foxtrot 4) (Record Page 233) nor the Appellee's Exhibit No. 2 (Area Forecast for New England, New York and adjacent coastal waters) (Record Page 234) to show that the Appellant entered into an area of known icing. The Law Judge has indicated that the Appellee's witnesses interpreted Exhibit No. 2 to include the entire New York State, and this is patently in error, as it specifically refers to "Northern New England, New York and adjacent coastal waters" and this in no way refers to Western Pennsylvania or Western New York. The same forecast referring to ceilings specifically calls out Western Pennsylvania and Western New York, which is a decidedly different area than the Eastern Coast of the United States, therefore, based on the report given to the Appellant that the tops of the clouds were approximately 3,700 ft. and the lack of information concerning the freezing level, and further Appellant's testimony that the information he received from the Appellee witness that there was no icing in the Western New York area can lead one only to the factual conclusion that based on the evidence presented the Appellant did not fly into an area of known icing conditions.

POINT 2

THERE IS NO INDICATION IN THE  
RECORD THAT STRUCTURAL ICING WAS  
THE CAUSE OF THE CRASH.

It is Appellant's contention that the engine had ceased



operating and that this was the cause of the crash and not the alleged structural ice. Nowhere in the record is there any indication that structural ice had caused the crash. The Appellee's witness, Mr. Dodson, testified that the transcript of the conversation between the Appellant and Departure Control does not specifically state that there was an ice buildup on the wing (Record Page 91). He further testified that he only assumed that the Appellant was referring to pitot heat when he was using anti-icing during an alleged conversation with the Appellant and did not connect anti-icing to engine anti-icing (Record Page 85).

Mr. Strzalkowski, an expert witness produced by the Appellant, had testified clearly as to his opinion that the aircraft was not developing power at the time of the crash because of the position of the propellor (Record Page 219 - 222).

Appellant's Exhibit No. 3 (Record Page 243) is a photograph of the aircraft clearly showing the front of the aircraft and the two-bladed propellor attached thereto. It shows that one blade was undamaged, and the other blade was bent in a rearward position. It is common knowledge in the field of aviation that when a propellor strikes the ground and the blades are bent in a rearward position, no power is being developed by that engine to the propeller. On the other hand, when the propellor blades are bent in a forward position, the engine is developing power to the propeller.



Mr. Strzalkowski clearly testified to this (Record Page 219 -222) and the Law Judge failed to take this into consideration in his Decision and the National Transportation Safety Board likewise failed to consider this testimony. This testimony alone supports the Appellant's position beyond any doubt whatsoever that the engine had not been operating and it was this factor that caused the crash of the aircraft.

The Appellee has based his entire case in establishing the Appellant's fault purely on assumptions. Further, the information that they received from the Appellant on January 7, 1975, while the Appellant was in a comatose condition was considered by the Appellee to establish the alleged violations. These statements were taken nine days after the crash and the Appellant's condition was testified to by four separate witnesses (Record Pages 131 - 179 and 225 - 228). The Appellant likewise testified that he had no recollection as to the this oral statement and that he had encountered structural ice. The Law Judge failed to take into consideration the overwhelming evidence as to this vital point.

The Appellee had relied heavily on Mr. Gardner, who allegedly arrived at the accident sight sometime after the accident. He testified that the ice he observed was only at the wing tip and that he only lifted the airplane at the wing tip and underneath the wing (Record Page 97 - 105). It is well known that ice is unlikely to



adhere to the underside of a wing and further, that ice does not form at the wing tip.

POINT 3

THE AIRCRAFT WAS NOT OVERLOADED

The Appellant testified fully as to the computations as to the weight and balance of the aircraft prior to departure. Again the Appellee investigators had relied heavily on an oral statement given to them on January 7, 1975, a scant nine days after the accident, wherein he allegedly said the aircraft was full of fuel. As indicated in the previous point, ample testimony from witnesses who observed the Appellant almost on a daily basis indicated that he was incoherent and comatose much of the time. The Appellant provided his computation of the weight of the airplane based on his own weight and the weight of the passengers, pursuant to his questioning them. He had also estimated the weight of the baggage and the total fuel on board corresponded to the total endurance of the aircraft of five hours and 20 minutes, and that at 6,000 ft. his proposed altitude, the total endurance of five hours and 20 minutes would have equated to 37 gallons. With full fuel in the airplane, the endurance would have been seven hours. The Appellant's Exhibit 1 (Record Page 241) was entered into evidence through the testimony of the Appellee's witness, Mr. Tubbs, (Record Page 46). His testimony was that total fuel on board expressed in terms of hours and minutes was given to him by the Appellant at the time of



filing the flight plan. The total fuel<sup>on</sup>/board was listed as five hours and twenty-five minutes (Record Page 48). Total fuel for this aircraft expressed in terms of endurance is seven hours. The Law Judge failed to take into consideration this testimony and that such information on the flight plan given prior to the departure of the flight in question would certainly be the best evidence as to the fuel on board and the total weight of the airplane.

The Appellee's witness testimony concerning the estimated weight of the baggage was completely contradictory. Mr. Dodson could not even remember whether he even investigated any accidents prior to this one, (Record Page 79). He also reported he arrived at the accident scene 15 to 16 hours after the accident, and his notes regarding certain dates and times were not accurate (Record Page 82). Mr. Dodson testified that he verified the estimated weight of the baggage on December 19, 1974, (Record Page 86) yet the baggage was in the direct control of Captain Scaccia, of the Erie County Sheriff's Department, who testified that it was not until January 8, 1975, that he got a telephone call from Mr. Dodson asking for his estimated weight of the baggage. Further Captain Scaccia had complete control of the baggage from the time he received it until he estimated the weight and personally kept the keys to the storage area (Record Page 125).

Further testimony as to the weights of the passengers was based purely on hearsay and the witnesses were unable to testify

how the weights were determined. This hearsay testimony was objected to by Appellant's attorney (Record Page 110 et seq. Record Page 114 - 116).

#### CONCLUSION

The Appellee has failed to prove that the aircraft was overloaded by its witnesses' inconsistency in the manner and time the weights of the passengers and the baggage were estimated.

The Appellant has clearly outlined his procedure in determining the maximum weight and has shown beyond a reasonable doubt the flight plan copied by Mr. Tubbs had listed a total endurance of the aircraft at five hours and twenty minutes, which equates to approximately 37 gallons, and places it well within the gross weight of the aircraft.

There is nothing from the testimony of the Appellee witnesses nor the Exhibits that show the Appellant entered into an area of known icing, as he was not informed of the freezing level, and that in any event, it could have been as high as 5,000 ft., and he was further given a top report of 3,700 ft.

The Appellee has attempted to establish Appellant's fault purely on assumptions. Oral statements were taken from the Appellant when he was in a comatose condition, and the Law Judge has failed to take into consideration obvious matters, such as the position of the propellor at the time of the crash that would have led them to the same conclusion as the expert witness....namely that the aircraft was not developing power at the time of the crash.



Mr. Gardner, the Appellee's witness, testified he was not familiar with icing on aircraft, and further testified that he had lifted the plane at the very wing tip on the bottom of the wing, and those knowledgeable with aviation know that ice does not adhere to that portion of the wing.

Further, the regional forecast gives no indication of the freezing level of Western New York, although it does give ceilings in Western New York, and Mr. Tubbs had interpreted the freezing level to include the entire New York State, when the report specifically says the freezing level is 2,000 to 5,000 ft. Southern New England, New York adjacent Coastal Waters, which specifically means the East Coast of the United States.

Based on the lack of freezing level information and knowing the temperature on the ground was above freezing, coupled with the invalid top reports provided by the Appellee, Appellant did not fly into known icing conditions.

The Law Judge has based his Decision in part on the fact that the Appellant does not use his Airman's Certificate to earn his livelihood, which implies that had he been using it as such, a different result could be arrived at.

In view of the complete testimony given at the time of the hearing, the Appellee has failed to prove their charges against

the Appellant and the Law Judge's Decision was not supported by substantial evidence by the facts presented to him and that the Conclusions resulting therefrom are in error, and that the violations against the Appellant should be dismissed.

Respectfully submitted,

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AFFIDAVIT OF SERVICE BY MAIL

RE: John L. McLucas etc

vs

George W. Irmisch

State of New York )  
County of Genesee ) ss.:  
City of Batavia )

No. 76-4273

I, Leslie R. Johnson being  
duly sworn, say: I am over eighteen years of age  
and an employee of the Batavia Times Publishing  
Company, Batavia, New York.

On the 24th day of February, 19 77  
I mailed        copies of a printed Resp. Brief in  
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10 copies (by Air Mail) to: A. Daniel Fusaro, Clerk  
U.S. Court of Appeals, Second Circuit  
New Federal Court House, Foley Square  
New York, New York 10007

2 copies (by Air Mail) to: Morton Hollander, Chief  
Appellate Section, Civil Division  
Room 3643, U.S. Dept. of Justice  
Washington, D.C. 20530

at the First Class Post Office in Batavia, New  
York. The package was mailed Special Delivery at  
about 4:00 P.M. on said date at the request of:

Robert J. Stein, Esq.

1711 Statler Hilton, Buffalo, New York 14202

Leslie R. Johnson

Sworn to before me this

24th day of February, 19 77

Patricia A. Lacey

PATRICIA A. LACEY  
NOTARY PUBLIC, State of N.Y., Genesee County  
My Commission Expires March 30, 1978